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The 1954 Supreme Court decision in Brown V. Board of Education, declaring racial segregation in public schools discriminatory and in violation of the equal protection clause of the fourteenth amendment, is a landmark in American legal and political history. It was inferred from the 1954 decision that the right to be free from discrimination was a "personal" and "present" right of the individual. However, the second Brown decision in 1955 opened the door to desegregation plans under which the achievement of equal treatmen could be postponed. The Supreme Court gave the lower courts the responsibility of requiring school districts to make a prompt and reasonable start toward desegregation but stated that additional time might be necessary to carry out the ruling. By this decision the Supreme Court adopted the position that a person whose right to equal protection has been disregarded by an agency of the State is not necessarily entitled to immediate relief.

The Supreme Court in these decisions did not indicate how long a deferment of desegregation was reasonable, but various lower courts have approved plans requiring many years. One Federal district court judge stated that, in plans for the transition to desegregated schools, some individual rights would have to be subordinated for the good of the many. Yet this concept of sacrifice does not resolve the inconsistency of acknowledging the existence of a right as personal and present and still refusing its enforcement.

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THE RIGHT TO EQUAL EDUCATIONAL OPPORTUNITIES AS A PERSONAL AND PRESENT RIGHT

PAUL HARTMAN†

I

INTRODUCTION

THE 1954 decision of the Supreme Court in *Brown v. Board of Educ.*[1] declaring racial segregation in public schools discriminatory *per se* and therefore violative of the equal protection clause of the fourteenth amendment, is a landmark in American legal and political history. The ruling, which outlawed statutes and customs that had governed a large segment of this country for many generations, gave added meaning and vitality to the principle of equality before the law, written into our Constitution after the Civil War.

One aspect of this decision, having the potentiality of weakening the constitutional guarantee of equal protection, has attracted little attention.[2] Until the Supreme Court decision of 1955[3] implementing its basic decision of the previous year, it was an undisputed doctrine of constitutional law that the right to be free from discrimination, protected by the equal protection clause of the fourteenth amendment, was a "personal" and "present" right of the individual who invoked it. This article will discuss the origin and development of that doctrine and the effect the second *Brown* decision had on it.

II

SUPREME COURT DECISIONS ESTABLISHING THE PRESENT AND PERSONAL DOCTRINE

McCabe v. Atchison, T. & S.F. Ry.,[4] is usually cited as the first decision stressing the personal nature of the right to equal protection. In that case five Negroes sought a federal court injunction to restrain five railroad companies from complying with an Oklahoma statute

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1. 347 U.S. 483 (1954), referred to in this article as the first Brown decision.

2. But see short reference to this problem in 2 United States Commission on Civil Rights Reports 6 (1961). See also Greenberg, Race Relations and Group Interests in the Law, 13 Rutgers L. Rev. 503 (1959).

3. Brown v. Board of Educ., 349 U.S. 294 (1955), referred to in this article as the second Brown decision.

4. 235 U.S. 151 (1914).

known as the "separate coach law." The statute required railroad companies doing business in the state to provide separate and equal accommodations for white and Negro passengers. Section 7 authorized the railroads to attach to their trains sleeping, dining, or chair cars "to be used exclusively by either white or Negro passengers." Two lower courts dismissed the action which, under the then prevailing "separate but equal" doctrine, failed to state a cause of action. The Supreme Court affirmed on the ground that the five plaintiffs had never traveled or sought to travel on any of the railroad lines and therefore had no standing to sue. But in the course of his opinion delivered for the Court. Mr. Justice Hughes disagreed with the conclusion of the court below that Section 7 did not offend the fourteenth amendment since sleeping, dining, and chair cars were luxuries and the legislature could properly take into consideration the limited demand for such accommodations from Negroes. Mr. Justice Hughes said:

> This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.[5]

Thus, without citing any authority,[6] the Supreme Court declared the right to be free from discrimination a personal right protected by the fourteenth amendment.[7] In the context of the controversy, however, this meant merely that the right of an individual belonging to

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5. Id. at 161-62. Technically, this statement was dictum since the determination of the case—dismissal of the suit—was not predicated on it.

6. Which the Court may have regarded as unnecessary in view of the language of the fourteenth amendment (". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.") See Shelley v. Kraemer, 334 U.S. 1 (1948), where the Supreme Court relied on the "terms" of the equal protection clause in holding that it guarantees individual rights. 334 U.S. at 22. The history of the adoption of the amendment does not shed any light on this aspect of the equal protection clause. On this history see Frank and Munro, The Original Understanding of "Equal Protection of the Laws," 50 Colum. L. Rev. 131 (1950); Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955).

7. Although the opinion did not use the term "personal" to characterize the right to equal protection, the language used ("It is the individual who is entitled. . . .") amounts to the same. The "present right" concept is not yet apparent in this case.

a racial or religious group to be treated equally with members of the dominant group, in being provided with certain facilities, cannot be made dependent upon the number of other members of the same group who seek to use the same facilities.[8]

In the case of *Missouri ex rel. Gaines v. Canada*,[9] Chief Justice Hughes relied on the language he used in *McCabe* to reject an argument similar to that made in the earlier case. One of the reasons advanced against Negro petitioner's claim to be admitted to the University of Missouri Law School was the limited demand from Negroes in that state for legal education. In addition to stressing the "personal" nature of petitioner's right, the opinion made the point that the granting of equal opportunity to petitioner could not be deferred "for an indefinite period" to give the state authorities the time necessary to establish a law department at the Negro university.[10] "[W]e cannot regard the discrimination as excused by what is called its temporary character."[11] Here is the nucleus of the "present right" doctrine although it is not clear what the decision would have been if the state could have given the assurance that the plan to establish a Negro law school as a separate but equal facility could have been accomplished in a specified period involving only a short delay.[12]

All doubts in this respect disappeared when the Supreme Court published its *per curiam* opinion in *Sipuel v. Board of Regents*.[13] In upholding the Negro petitioner's right to be admitted to the School of Law of the University of Oklahoma, the only state institution for legal education, the Court said:

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8. Thus stated, the conclusion in McCabe, supra note 4 has never been in issue thereafter. In the many controversies following the second Brown decision, supra note 3, the difficulty a Negro pupil seeking admission to a white school encountered was never based on the ground that there are too few Negroes asking for similar relief; rather did the difficulties arise from the fact that too many sought admission at the same time.

9. 305 U.S. 337 (1938).

10. The United States Supreme Court reversed the judgment of the Missouri courts which had rejected petitioner's mandamus action to compel the curators of the State University to admit him to the law school. The rejection was based on the ground that petitioner had been offered tuition to study outside of Missouri pending establishment of a Negro law school in Missouri. The Supreme Court held that the state could not discharge its duty under the fourteenth amendment to give petitioner an opportunity equal to those given white persons to study law, by making available educational facilities outside of the state.

11. Supra note 9, at 352.

12. In Mitchell v. United States, 313 U.S. 80, 94 (1941) the Supreme Court cited this case and McCabe, supra note 4, in support of the statement that the denial of equality of accommodation because of race is an "invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment. . . ."

13. 332 U.S. 631 (1948).

> The State must provide [legal education] for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. *Missouri ex rel. Gaines v. Canada.*[14]

In *Shelley v. Kraemer*,[15] the personal nature of the right not to be discriminated against, declared in the previous decisions, was reaffirmed, though in a somewhat different context. In that case, the Supreme Court held that court enforcement of a racial restrictive covenant preventing use or occupancy of certain land by persons of the Negro or Mongolian race was prohibited under the equal protection clause.[16] One of the arguments made by those seeking enforcement of the covenant was that the state courts stand ready to enforce restrictive covenants directed against white persons and hence enforcement of anti-Negro covenants does not constitute discrimination against them by the state courts. Chief Justice Vinson, writing for a unanimous court, first pointed out that he was not aware of any case involving anti-white covenants and then stated the "fundamental" consideration for rejecting the argument:

> The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners[17] to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.[18]

While in *McCabe* the personal nature of the right to be free from discrimination was declared in order to make the existence of such right independent of the number of other members of the *same* racial group who were victimized by the discrimination, in *Shelley* the

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14. Id. at 633. The subsequent decision of the Supreme Court in this case, sub nom. Fisher v. Hurst, 333 U.S. 147 (1948), dealing with the question whether the Oklahoma courts followed the mandate given in Sipuel, is based on the premise that petitioner must be provided with opportunity for legal education not later than applicants of any other group.

15. Supra note 6.

16. For a summary of the facts and the ruling in this case, see Saks and Rabkin, Racial and Religious Discrimination in Housing, 45 Iowa L. Rev. 488, 495 (1960).

17. The Negro couples seeking reversal of decisions by the Missouri and Michigan Supreme Courts ordering enforcement of the covenants.

18. Shelley v. Kraemer, supra note 6, at 22. The opinion refers in a footnote to McCabe, supra note 4, Missouri ex rel. Gaines v. Canada, supra note 9 and Oyama v. California, 332 U.S. 633 (1948). The latter decision held that the California authorities in applying that state's Alien Land Law had discriminated against petitioners because of their Asiatic origin. The Court's opinion in this case does not expressly characterize the right under the equal protection clause as a personal right.

declaration of the personal nature of the right served to make its protection independent of whether members of *other* racial groups were likewise victimized.[19]

It was in *Sweatt v. Painter*,[20] and the companion case of *McLaurin v. Oklahoma State Regents*,[21] that the rights guaranteed by the equal protection clause were expressly characterized as "personal and present."[22] In these decisions the Supreme Court declared racial segregation as practiced in post-graduate education discriminatory and therefore unconstitutional. Unlike *Sipuel* and *Missouri ex rel. Gaines* no attempt had been made by the school authorities to postpone the granting of educational facilities for the Negro petitioners, nor were efforts made to defeat their right by arguments of the kind used in *McCabe* or *Shelley*.[23] The rule pronounced by the Court in *Sweatt* and *McLaurin*, that educational segregation on the graduate level was discriminatory, did not require any specific reaffirmation of the right to equal protection as a personal and present right. Rather, it seems, the Court used the occasion to put such characterization of the right beyond dispute. The term "fundamental" employed to describe the doctrine is noteworthy in this connection.[24]

III

THE FIRST BROWN DECISION AND "CLASS ACTIONS"

In the decision on the four public school segregation cases, usually cited under the name of *Brown v. Board of Educ.*, the Supreme Court struck down the "separate but equal" doctrine which had sought to reconcile racial segregation in public schools with equal protection under the fourteenth amendment.[25] In finding racial segregation inherently unequal, the Court held that the plaintiffs,—Negro children attending segregated public schools—"and others similarly situated

19. This aspect of the personal nature of the right against discrimination would serve to rule out attempts in school desegregation controversies to defend state laws requiring racial segregation on the ground that, just as Negroes are barred from attending white schools, children of the white race are barred from attending Negro schools. See reference to such an argument in Sweatt v. Painter, 339 U.S. 629, 634 (1950).

20. Sweatt v. Painter, supra note 19, at 635.

21. 339 U.S. 637, 642 (1950).

22. Sweatt cites Sipuel, supra note 13, Missouri ex rel. Gaines v. Canada, supra note 9, and Shelley v. Kraemer, supra note 15, while McLaurin relies on the language in Sweatt.

23. The reference to Shelley v. Kraemer in the Sweatt opinion is made only in connection with a possible argument ("It may be argued . . . .").

24. Sweatt v. Painter, supra note 19, at 635.

25. In a fifth case—Bolling v. Sharpe, 347 U.S. 497 (1954)—racial segregation in the public schools of the District of Columbia was held to violate the due process clause of the fifth amendment.

for whom the actions have been brought," had been deprived of equal protection. No specific relief was granted in the decision; the Court deferred this question to a subsequent decision to be made after further argument by the parties.[26]

There is nothing in this opinion inconsistent with the doctrine established by the decisions beginning with *McCabe* and culminating in *Sweatt* and *McLaurin*, that the right to equal protection under the fourteenth amendment is a personal and present right.[27] There is no indication in this opinion that the plaintiffs would not be ordered admitted immediately to schools theretofore reserved to white pupils.[28]

So far as the "personal" nature of the right is concerned, it is necessary to discuss the implications of the fact that the four actions involved were "class actions,"[29] meaning actions brought by the individual plaintiffs for themselves "and others similarly situated."[30]

Rule 23(a) of the Federal Rules of Civil Procedure[31] permits class actions in three types of cases where "persons constituting a class are so numerous as to make it impracticable to bring them all before the court." The third type—used in the school segregation cases—presupposes that "the character of the right sought to be enforced for . . . the class is . . . several, and there is a common question of law or fact affecting the several rights and a common relief is sought." The "class"

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26. The Attorney General of the United States and the state attorneys general were also invited to participate in the argument on specific relief.

27. The phrase "children of the minority group," used in the first Brown decision, supra note 1, at 493, should be understood in the context of the opinion as referring to the Negro plaintiffs; there is no need to read into these words any recognition of a group right as distinguished from the plaintiffs' personal rights.

28. The delay necessitated by the Court ordering further argument on the relief to be granted, of course, must be ignored because the concept of a "present right" refers to the moment when the Court renders a final decision disposing of the matter, which, in the school segregation cases, occurred only when the Court rendered the decree granting specific relief, which was the second Brown decision, supra note 3.

29. Brown v. Board of Educ., 347 U.S. at 495.

30. Ibid.

31. Fed. R. Civ. P. 23(a) reads as follows:

> Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

On class actions in cases based on racial discrimination, see Note 1 Race Rel. L. Rep. 991 (1956); Note, 62 Colum. L. Rev. 1448, 1465 (including footnote 122) (1962).

within the meaning of Rule 23 consisted of all Negro children in the school district whose board was sued. The right sought to be enforced —to be free from discrimination—was separate and distinct for each child. The common questions of fact and law were those relating to the inconsistency of racial segregation with equality, and the common relief sought was elimination of segregated school facilities for the Negro children in the school district.

A personal right does not lose its character because others, few or many, enjoy the same right. The fact that the actions in the school segregation cases were class actions demonstrates only that there were many persons other than the plaintiffs with the same grievance.[32]

It is true that as a result of a successful class action a person who has not sought court relief for the denial of his right to equal protection is placed in a position where through contempt proceedings[33] he may enforce a court judgment rendered at the behest of another member of the class. But when he chooses to avail himself of this opportunity it is his personal right which the court enforces. In the court proceeding which resulted in the judgment determining his right along with the rights of the other persons similarly situated, he was represented by one or a few of those persons (the individual plaintiffs). Just as a personal right of a minor or an incapacitated person does not cease to be a personal right even though it is vindicated through court action brought by his "next friend" acting in his behalf, the representation implicit in a class action does not affect the nature of the right of those unnamed persons in whose behalf the individual plaintiffs act.[34]

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32. This multiplicity of aggrieved persons was absent in all the pre-Brown cases discussed above. There is no objection to speaking of a "class right" or "group right" in such a situation so long as it is understood that what is meant is the multiplicity of individual, personal rights resulting from the fact that all individuals have the same characteristics (i.e. racial characteristics) typical for the group. So understood, a "group right" is not inconsistent with the existence of personal rights of each member of the group. It is in this sense that the United States Court of Appeals, Fifth Circuit, referred to the right to desegregation of public schools as both an individual and a class right. Bush v. Orleans Parish School Bd., 308 F.2d 491, 499 (5th Cir. 1962).

33. But doubts have been expressed as to whether the res judicata effect of judgments in class actions under Rule 23(a)(3) extends to members of the class other than the individual plaintiffs. See Note 1 Race Rel. L. Rep. 1001 (1956).

34. Federal courts have repeatedly held that the personal nature of the right to equal protection does not rule out the use of class action under Rule 23. Williams v. Kansas City Mo., 205 F.2d 47 (8th Cir. 1953), cert. denied, 346 U.S. 826 (1953). The Circuit Court of Appeals affirmed the decision of a federal district court, 104 F. Supp. 848 (W.D. Mo. 1952), granting relief to three Negro residents of Kansas City, Missouri, who had been denied admission to a swimming pool. But the Court of Appeals disagreed with the lower court's dismissal of the class action aspect based on the ground that the right to equal protection was a personal right. Said the Court of Appeals: "Violations of the Fourteenth Amendment are of course violations of individual or personal rights,

IV

THE SECOND BROWN DECISION

It was the second decision in *Brown v. Board of Educ.*[35] which opened the door to desegregation plans under which the achievement of equal treatment as understood by the Supreme Court (unsegregated public school facilities) could be postponed. In this decision, the Supreme Court spelled out the manner in which its decisions of the previous year, declaring racial segregation in public schools unconstitutional, should be implemented and relief granted. In remanding the cases to the lower federal courts for the fashioning and effectuating of the decrees, the Court directed the lower courts to apply "equitable principles." (In all four cases, the plaintiffs had asked for injunctions, thus opening the door for the use of equitable doctrines.) The Court said:

> Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.[36]

The Court then elaborated on the public and private needs. As to the private needs, the Court stated:

> At stake is the personal interest of the plaintiffs in admission to public schools *as soon as practicable* on a non-discriminatory basis.[37] (Emphasis added.)

The public interest to be considered was that obstacles to desegregation be eliminated "in a systematic and effective manner."

The lower courts were told to require the school districts to "make a prompt and reasonable start toward full compliance" with the 1954 ruling.

> Once such start has been made (the Supreme Court continued) the courts may find that additional time is necessary to carry out the ruling in an effective manner.[38]

The Court placed on the school districts the burden to establish that such additional time "is necessary in the public interest and is con-

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but where they are committed on a class basis or as a group policy, such as a discrimination generally because of race, they are no less entitled to be made the subject of class actions and class adjudications under Rule 23, Federal Rules of Civil Procedure, 28 U.S.C.A., than are other several rights." 205 F.2d at 52. As to other cases, see Note, 1 Race Rel. L. Rep. at 1003. A recent decision on this point is Willie v. Harris County, 202 F. Supp. 549, 554-55 (S.D. Tex. 1962).

35. Supra note 3.
36. 349 U.S. at 300.
37. Ibid.
38. Ibid.

sistent with good faith compliance at the earliest practicable date." The lower courts were told to retain jurisdiction during the "period of transition." In conclusion, the Supreme Court ordered the lower courts to enter such orders "as are necessary and proper to admit to public schools on a racially non-discriminatory basis with all deliberate speed the parties to these cases."[39]

By this decision the Supreme Court adopted the position that a person whose right to equal protection has been disregarded by an agency of the state is not necessarily entitled to immediate relief. It reaffirmed this position in *Cooper v. Aaron*,[40] when it mapped the course of action the federal district courts were to follow under the rules laid down in the second *Brown* decision After stating that in many locations obedience to the duty of desegregation would require the immediate general admission of qualified Negro children, the Court said:

> On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the *present* nonsegregated admission of all qualified Negro children.[41] (Emphasis added.)

The Supreme Court in these decisions did not indicate how long a deferment of desegregation it would countenance. But various federal courts professing to act under the rules enunciated in the second *Brown* decision approved plans for gradual desegregation, the completion of which would take many years. For example, the Federal District Court in Houston ordered a grade-a-year school desegregation plan,[42] later affirmed by the United States Court of Appeals, Fifth Circuit, which will bring about desegregation of the twelfth grade as late as September, 1971.[43] No review of this decision by the Supreme Court was sought. In other cases the Supreme Court denied petitions for review of lower court decisions approving gradual desegregation plans extending over five and nine years, respectively.[44]

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39. Id. at 301.
40. 358 U.S. 1 (1958).
41. Id. at 7.
42. Ross v. Peterson, 5 Race Rel. L. Rep. 709 (1960).
43. Houston Independent School Dist. v. Ross, 282 F.2d 95 (5th. Cir. 1960). See 2 United States Commission on Civil Rights Report 15 (1961), which contains a summary of the practice of the courts relating to deferred and gradual desegregation plans. For a recent decision approving a gradual desegregation plan extending until 1969, see Mapp v. Board of Educ., 203 F. Supp. 843 (E.D. Tenn. 1962).
44. Kelley v. Board of Educ., 270 F.2d 209 (6th Cir. 1959), cert. denied, 361 U.S. 924 (1959); Slade v. Board of Educ., 252 F.2d 291 (4th Cir. 1958), cert. denied, 357 U.S. 906 (1958). In Watson v. City of Memphis, 373 U.S. 526 (1963), the Supreme

From a practical point of view,[45] the Supreme Court's ruling in the second *Brown* decision, permitting postponement of elimination of discriminatory practices, constitutes a departure from the Court's attitude in the earli[er] cases. This shift is best demonstrated by a comparison of this aspect of the second *Brown* decision with the *Sipuel*[46] decision. There it was held that the state had the duty to offer the Negro plaintiff equal educational opportunities for legal education with white students "as soon as it does for applicants of any other group." Since white students at the time of the decision had at their disposal a state institution for legal education, the Negro was entitled to receive the same education immediately. There is nothing in the decision which would even remotely support the conclusion that the enjoyment of this right to equal protection could be postponed for a short or a long period. Similarly, the statement in *Sweatt*[47] and *McLaurin*[48] that the right to equal protection under the fourteenth amendment is a "present" right cannot be understood to mean anything but "enforceable at present." In contrast, the right of a Negro pupil to equal, that is, desegregated public school education under the *Brown* decisions is not currently enforceable if the Court authorizes desegregation arrangements under which enjoyment of this right by this pupil will be realized only at a later date.[49]

There is another consequence of court approval of plans for gradual desegregation, which is even more drastic than that of postponement of the enjoyment of a constitutional right. All those Negro pupils who will terminate their public school education before the desegregation plan approved by the court will reach them lose the

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Court made the point that desegregation plans which in 1955 may have met the requirement of "deliberate speed" might not meet the test when put into effect today. 373 U.S. at 530. This statement seems to reflect a certain impatience on the part of the Court with the pace of desegregation in the eight years intervening since the second Brown decision. See also Goss v. Board of Educ., 373 U.S. 683, 689 (1963).

45. Ignoring the fact that in the second Brown decision, the Court did not disavow the present right doctrine, Greenberg, supra note 2, at 507, but merely denied a present remedy.

46. Supra note 13.

47. Supra note 19.

48. Supra note 21.

49. It is true that in Sipuel and Sweatt the educational opportunities sought by plaintiffs (graduate studies) had not been provided by the state for Negroes, whereas in the School Segregation cases, educational facilities of the kind involved (on the elementary and secondary level) were available to Negroes, though on a segregated basis. But since, according to the decision in the latter cases, segregated educational facilities were necessarily inferior, the situation of the pupils in these cases was the same as that of the plaintiffs in Sipuel and Sweatt: the State denied them that kind of public education which was granted white pupils.

opportunity to equal educational facilities forever.[50] Thus, in the Houston example mentioned above, except for the possibility of transfer in individual cases, all Negro pupils who attended the second or any higher grade in September, 1960, when the grade-a-year plan went into effect, continue to attend segregated schools until graduation. Though on a less extensive scale, loss of opportunity for desegregated, that is, equal education, will result for some pupils in all instances where the plan permits a postponement of desegregation beyond the current school year.[51] It will be difficult to convince those students affected[52] that their right to be treated without racial discrimination is a "personal and present right."[53]

The shift in the Supreme Court's position was due to practical considerations. The implementation of the desegregation decisions in *Gaines, Sipuel,* and *Sweatt* relating to a few students seeking admission to graduate schools did not present particular administrative difficulties. But desegregation of the many public school children involved in the class actions in *Brown* was likely to create considerable problems which would assume enormous dimensions if, as was unavoidable under the rule of law, the desegregation decision in *Brown* would require the elimination of segregated public education of many millions of school children throughout the South. It is readily understandable that the Supreme Court sought to facilitate the transition, involving as it did the uprooting of local customs of long standing, by avoiding the requirement of immediate, complete desegregation.[54]

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50. Greenberg, supra note 2, at 504.

51. In Jackson v. School Bd., 203 F. Supp. 701 (W.D. Va. 1962) a federal district court approving a plan for gradual desegregation said: "It is objected that pupils in the upper grades will never obtain a desegregated education but this of course is true of any plan of gradual desegregation." 203 F. Supp. at 706.

52. It may be the very individual who originally applied for admission to a desegregated school. Dove v. Parham, 181 F. Supp. 504, 514 (E.D. Ark. 1960) partly affirmed, partly remanded, 282 F.2d 256 (8th Cir. 1960).

53. Cf. Sweatt v. Painter, supra note 19; McLaurin v. Oklahoma State Regents, supra note 21.

54. In Watson v. City of Memphis, supra note 44, at 531, the Supreme Court stated that the second Brown decision "reflected no more than a recognition of the unusual and particular problems inhering in desegregating large numbers of schools throughout the country." See also Hartman, The United States Supreme Court and Desegregation, 23 Modern L. Rev. 353, 356 (1960); Greenberg, supra note 2, at 506. The holding of the first Brown decision, that in the field of public education racial segregation amounts to racial discrimination, has been extended to other areas, including public parks and other recreational facilities. Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954); Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955); Holmes v. City of Atlanta, 350 U.S. 879 (1955). But in Watson v. City of Memphis, supra, the Supreme Court held inapplicable to public recreational facilities the ruling of the second Brown decision permitting gradual desegregation. The Court said: "We are not here confronted with attempted desegregation of a local school system with any

V

THE EQUITABLE PRINCIPLES USED IN THE SECOND BROWN DECISION

As mentioned above, the Supreme Court in the second *Brown* decision referred to "equitable principles" as justifying decrees which, in implementing the principles set forth in the first *Brown* decision, would be permitted to reconcile the personal interest of the plaintiffs in non-discriminatory admission to public schools "as soon as practicable," with the public interest in the elimination of the obstacles to such a transition "in a systematic and effective manner." Thus, the authorization, contained in the second *Brown* decision, to postpone at least for part of the Negro pupils involved the actual achievement of equal treatment, is based on the application of rules of equity. The Court cited two of its decisions in giving equity this effect. *Alexander v. Hillman*[55] was cited as authority for the proposition that equity traditionally has been characterized "by a practical flexibility in shaping its remedies," and *Hecht Co. v. Bowles*[56] was cited to support the statement that equity traditionally has been characterized "by a facility for adjusting and reconciling public and private needs."

It is interesting to note that in neither case was there an issue of whether the enjoyment of a right may be postponed or denied by the use of equitable principles. The question in *Alexander v. Hillman* was whether, in receivership proceedings in which officers of the corporation claimed the right to share in the distribution of its assets, such officers were subject to the court's jurisdiction with respect to a counterclaim based on their alleged misappropriation of corporation funds. The Court answered the question in the affirmative. Referring to the principle of flexibility governing equity proceedings, it stated that courts of equity "may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to *safeguard, conveniently to adjudge* and *promptly to enforce* substantial rights of all the parties before them."[57] (Emphasis added.)

The narrow issue in *Hecht Co. v. Bowles* was whether, despite the

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or all of the perhaps uniquely attendant problems, administrative and other, specified in the second *Brown* decision as proper considerations in weighing the need for further delay in vindicating the Fourteenth Amendment rights of petitioners." 373 U.S. 531-32.

55. 296 U.S. 222, 239 (1935).

56. 321 U.S. 329, 329-30 (1944).

57. Alexander v. Hillman, supra note 55, at 239. However, a reference to a possible postponement in the granting of rights through the exercise of equity appears in Section 28 of Story's Equity Jurisprudence, cited in Alexander v. Hillman ("Courts of Equity . . . may vary, qualify, restrain, and model the remedy so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all parties").

language of the Emergency Price Control Act of 1942 *requiring* the courts to issue injunctions where violations of the Act were established, a federal court could refrain from doing so if it found that in an individual case the issuance of an injunction would not be in the public interest. The Supreme Court held that equity courts had such a discretion "in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect."[58]

But, of course, the Supreme Court could have cited other decisions which unequivocally affirm the right of courts of equity to withhold or deny relief if the public interest so demands.[59]

The instances in which the Supreme Court has withheld or denied a remedy on grounds of public interest normally involve statutory or common law rights. The rights in question in the cases mentioned in footnote 59 derived from bankruptcy legislation,[60] patent legislation,[61] the Packers and Stockyards Act,[62] the Railway Labor Act,[63] or were rights based on contract[64] or tort.[65] In one instance, in which it was claimed that the application of the equitable doctrine would violate a

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58. Hecht Co. v. Bowles, supra note 56, at 330. The "public interest" underlying the enactments whose interpretation is involved in this case may be contrasted with the "public interest" referred to in the second Brown decision; in the latter case the Supreme Court declared the public interest in a systematic and orderly desegregation without reference to any statute.

59. For example, SEC v. U.S. Realty & Improvement Co., 310 U.S. 434, 455 (1940). ("A court of equity may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest. It may in the public interest, even withhold relief altogether. . . ."); United States v. Morgan, 307 U.S. 183, 194 (1939) (the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved). Other decisions along these lines, some of which were relied upon by the two above-mentioned decisions, are Virginia Ry. v. System Fed'n No. 40, 300 U.S. 515, 552 (1937); Pennsylvania v. Williams, 294 U.S. 176, 185 (1935); Central Kentucky Natural Gas Co. v. Railroad Comm'n of Kentucky, 290 U.S. 264, 271 (1933); City of Harrisonville v. W. S. Dickey Clay Mfg. Co., 289 U.S. 334, 338 (1933); Beasley v. Texas & Pac. Ry., 191 U.S. 492 (1903); Joy v. St. Louis, 138 U.S. 1 (1890); Texas & Pac. Ry. v. Marshall, 136 U.S. 393 (1890). See further Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 670 (1944); American United Mut. Life. Ins. Co. v. City of Avon Park, 311 U.S. 138, 145 (1940). Cf. Note, 64 Yale L.J. 125 (1954), in particular footnotes 15 and 19.

60. American United Mut. Life Ins. Co. v. City of Avon Park, supra note 59; SEC v. U.S. Realty & Improvement Co., supra note 59; Pennsylvania v. Williams, supra note 59.

61. Mercoid Corp. v. Mid-Continent Inv. Co., supra note 59.

62. United States v. Morgan, supra note 59.

63. Virginian Ry. v. System Fed'n No. 40, supra note 59.

64. Beasley v. Texas & Pac. Ry., supra note 59; Joy v. St. Louis, supra note 59; Texas & Pac. Ry. v. Marshall, supra note 59.

65. City of Harrisonville v. W. S. Dickey Clay Mfg. Co., supra note 59.

constitutional right based on the fourteenth amendment, the Supreme Court, although reaffirming the doctrine, decided that in the instant case it could not be applied.[66]

Reluctance on the part of the Supreme Court to deny "in the public interest" a remedy sought to enforce a right protected by the Constitution would seem to be understandable. Even though theoretically it might be asserted that a right remains a right even though it may not be enforced, the respect which a right guaranteed and protected by the Constitution should command is not enhanced by a ruling that in the public interest the person whose constitutional right has been violated will not be granted a remedy. To many it might be incomprehensible to have the Supreme Court, which has the duty of being watchful for the constitutional rights of the individual,[67] render a decision which appears to place "public interest" above the protection of a constitutional right.

There are subtler methods by which the enforcement of a claimed constitutional right can be avoided if such enforcement would not be in the public interest. Instead of acknowledging the constitutional right and denying a remedy for its enforcement, the court could construe the constitutional provision so as to limit the scope of the right itself. Once it is established that a right granted by the Constitution is not absolute, considerations of public interest may influence the court in deciding whether such right is broad enough to cover the claim of the person invoking it.

The right of free speech and free press guaranteed by the first amendment may serve as an example. Though framed in absolute terms, the Supreme Court has held time and again that it is not an absolute right.[68] In delineating its scope the Court repeatedly referred to public interests to be considered. Thus, in upholding the constitutionality of the Subversive Activities Control Act against the charge that its registration and disclosure provisions violate freedom of expression and association as protected by the first amendment, the Court's opinion distinguished the case at bar from other cases where a vindication of these rights had been successful, by referring to the

66. Central Kentucky Natural Gas Co. v. Railroad Comm'n of Kentucky, supra note 59. See also Note, 64 Yale L.J. 125 (1954), pointing out that in Youngstown Co. v. Sawyer, 343 U.S. 579 (1952), the United States Government requested that the Court deny in the public interest an injunction against the seizure of the steel industry even though the seizure might have violated constitutional rights. The Supreme Court refused the Government's request.

67. Boyd v. United States, 116 U.S. 616, 635 (1886).

68. E.g., Konigsberg v. State Bar of California, 366 U.S. 36, 49 (1961); Times Film Corp. v. City of Chicago, 365 U.S. 43, 47 (1961); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957); Breard v. City of Alexandria, 341 U.S. 622, 642 (1951).

"magnitude of the public interests" which the provisions of the statute were designed to protect.[69] In another decision the Court said that where first amendment rights are asserted to bar government interrogation, resolution of the issue always involves "a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[70] In a decision holding obscenity not to be within the area of constitutionally protected speech or press, the Court referred to considerations of the "social interest in order and morality" as outweighing the importance of protecting obscene utterances in view of their "slight social value as a step to truth."[71] And finally, the "clear and present danger" doctrine both in its original formulation[72] and as later broadened[73] uses the public interest as a factor determining the scope of freedom of speech and press.[74]

If the Supreme Court had used this method of giving a constitutional right a restrictive interpretation to authorize gradual desegregation in the *Brown* decision, this would have been tantamount to a clear abandonment of the doctrine laid down in *Sipuel*[75] and the related cases. By declaring the right to equal protection under the fourteenth amendment to be a present right, the Court, in effect, gave this right the character of an absolute right, one that currently exists and currently must be enforced. In the first *Brown* decision the Court adjudicated the constitutional right of the Negro plaintiffs to desegregated public education in unambiguous terms without indicating any limitation in the scope of this right. Hence, the Supreme Court may have felt that the proper method of giving way to the public interest in a gradual effectuation of desegregation was to sanction considerations of a restrictive nature in the "shaping" of the *remedy* while leaving the absolute nature of the *right* inviolate.

Even so, it is doubtful whether the disposition made in the second *Brown* decision can be reconciled with the "present right" doctrine of the *Sipuel* decision, since it seems that by stating the right in abso-

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69. Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 93 (1961).

70. Barenblatt v. United States, 360 U.S. 109, 126 (1959).

71. Roth v. United States, 354 U.S. 476, 485 (1957), referring to Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

72. Schenck v. United States, 249 U.S. 47, 52 (1919).

73. Dennis v. United States, 341 U.S. 494, 508 (1951). On the broadening effect of this decision on the doctrine, see Konvitz, Fundamental Liberties of a Free People 307 (1957).

74. For a critique of the balancing method as used by the Supreme Court in interpreting the first amendment's guarantee of free speech, see Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424 (1962).

75. Supra note 13.

lute terms ("present right") the Court ruled out the use of the equitable doctrine in adjudications involving the right to equal protection. On the other hand, it can be argued that there is no inconsistency between the two decisions because in *Sipuel* and the related cases there was no public interest calling for the application of the equitable doctrine under which a court may deny a remedy permanently or temporarily in the public interest. This argument finds support in a subsequent decision of the Supreme Court which appears to give the *Sipuel* doctrine a less sweeping meaning than that suggested by the language it used in *Sipuel*. In *Florida ex rel. Hawkins v. Board of Control*,[76] the Supreme Court rejected an effort by the Florida Supreme Court to apply the gradual implementation procedure authorized by the second *Brown* decision to the case of a Negro seeking admission to the College of Law of the University of Florida. The Court indicated that decrees involving graduate study do not present the problems of public elementary and secondary schools. It stressed that "as this case involves the admission of a Negro to a graduate professional school, there is no reason for a delay." It ordered the Negro's "prompt admission," citing its decisions in *Sweatt v. Painter*,[77] *Sipuel v. Board of Regents*,[78] and *McLaurin v. Oklahoma State Regents*,[79] all cases dealing with admission to graduate schools.[80] Thus, the Supreme Court in this case took the position that in cases involving admission of Negroes to graduate schools there is no public interest in a possible postponement of desegregation and therefore no need to resort to the equitable doctrine of denying or withholding a remedy sought to undo a wrong.[81]

VI

PERSONAL INTEREST AS AGAINST GROUP INTEREST

Of course, for the Negro child whose right to desegregated education has been recognized (first *Brown* decision) but who, under the gradual plan of desegregation adopted by the courts, will never enjoy such education, it is little comfort to be told that this is not due to any deficiency of his right but rather to the manner in which the remedy for violations of the right has been shaped. Viewed realistically, for

76. 350 U.S. 413 (1956).
77. Supra note 19.
78. Supra note 13.
79. Supra note 21.
80. On this case see also Hartman, supra note 54, at 357-58.
81. See also Lucy v. Adams, 350 U.S. 1 (1955) in which the Supreme Court, referring to the Sipuel and related decisions dealing with graduate education, reinstated a permanent injunction granted by a federal district court requiring the University of Oklahoma to admit two Negro petitioners to its courses.

him the right to desegregated education, to which he is entitled under the equal protection clause of the fourteenth amendment, is not a personal and present right.[82]

Lower federal courts in approving gradual desegregation plans usually pay little attention to this problem.[83] It is interesting that federal courts in the same decision have stressed the personal nature of the right to desegregation as against a general right to integration of all whites and Negroes,[84] while approving plans for gradual desegregation which necessarily must result in the postponement of desegregation for a number of individual Negroes or even in their complete exclusion from desegregated education.[85]

However, some courts have felt the necessity of offering an explanation in terms psychologically acceptable to the affected Negro pupils. A federal district court judge who approved a gradual desegregation plan for Knoxville, Tennessee, said:

> Some individuals, parties to this case, will not themselves benefit from the transition. At a turning point in history some, by the accidents of fate, move on to the new order. Others, by the same fate, may not. If the transition is made successfully, these plaintiffs will have had a part. Moses saw the land of Judah from Mount Pisgah, though he himself was never to set foot there.[86]

In affirming this judge's decree with modifications, the United States Court of Appeals, Sixth Circuit, approved his "eloquent" language and said that:

> The Supreme Court contemplated that there would have to be plans for the transition and that some individual rights would have to be subordinated for the good of many.[87]

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82. Note, 64 Yale L.J. 128 (1954) speaks of the "absurdity of a decision holding that plaintiffs have rights, followed by a decree which in effect denies those rights."

83. See language of decision cited in note 51 supra, which hardly can be called enlightening.

84. The original and often cited expression of this limited interpretation given to the Supreme Court's decisions in Brown v. Board of Educ. is that of the United State's District Court, Eastern District, South Carolina, in Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955). It said that the Supreme Court "has not decided that the states must mix persons of different races in the schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains." See also Avery v. Wichita Falls School Dist., 241 F.2d 230, 233 (5th Cir. 1957); Borders v. Rippy, 247 F.2d 268 (5th Cir. 1957); Wheeler v. Durham City Bd. of Educ., 196 F. Supp. 71, 80 (M.D.N.C. 1961).

85. E.g., Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960) approving in principle a gradual desegregation plan while stressing the need of the Negro children to be treated as individuals. See supplemental opinion relying on Briggs v. Elliott, supra note 84.

86. Goss v. Board of Educ., 186 F. Supp. 559, 569 (E.D. Tenn. 1960).

87. Goss v. Board of Educ., 301 F.2d 164, 168 (6th Cir. 1962). See also Maxwell v. Board of Educ., 301 F.2d 828, 829 (6th Cir. 1962).

This concept of "sacrifice" does not resolve the inconsistency of acknowledging the existence of a right as a personal and present right and yet refusing its enforcement. This concept would make sense only if the right to equal protection under the fourteenth amendment could be viewed as a group right rather than a personal right.[88] If it is the Negro population as a minority group which is entitled to attend public schools without discrimination in the form of segregated educational facilities, then the objective of any corrective plan would be to bring about complete integration of all Negro children in public education. If achievement of this goal requires a gradual process of desegregation, interests of individual Negroes would have to yield to the interest of the group as a whole. Such a group right concept is foreign to American constitutional law and specifically to the equal protection clause in view of its language and the interpretation, never expressly abandoned, which the Supreme Court gave to it in the earlier cases. But the second *Brown* decision, by weakening the impact of the "personal and present" doctrine formulated in those cases,[89] may provide an argument in support of schemes aimed at improving the status of minority groups which, to achieve their objectives, are willing to curtail the "personal and present" right of some individual members of the group.[90]

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88. See Greenberg, supra note 2, at 506, who states that gradualism extending beyond that necessary to carry out the change from a dual to a unified method of operation "reveals a refusal to treat Negroes as persons and an insistence on viewing them as part of a group." This writer does not see in this context any difference between "necessary" gradualism and other gradualism, quite apart from the difficulty of determining when gradualism is necessary and when it is not.

89. Greenberg, supra note 2, at 507 on the one hand, concedes that the "elasticity of the deliberate speed formula" in the second Brown decision has permitted gradualism in school desegregation plans, while on the other hand, he claims that the School Segregation cases, including the second Brown decision, "meant that henceforth, unquestionably persons should be treated as individuals, not as members of a racial group." Id. at 504.

90. One such scheme is the "benign" or "benevolent" housing quota which is a system under which a fixed ratio is established in terms of race or ethnic origin for the occupancy of a housing development, for the purpose of achieving and maintaining integration. Viewed from the point of view that the right to equal protection is a personal right, such schemes would appear to be unconstitutional because implicit in them is denial of accommodation to individuals because of their race if the quota of that race is filled. See Progress Dev. Corp. v. Mitchell, 182 F. Supp. 681, 707 (N.D. Ill. 1960), affirmed in part and reversed in part, 286 F.2d 222 (7th Cir. 1961). The group theory, on the other hand, would have no difficulty in subordinating the personal interest of the individual to the right of the whole minority group. On benign quotas and constitutional problems arising from them, see Greenberg, supra note 2; Jacobs, Benign Quotas: A Plan for Integrated Private Housing, 70 Yale L.J. 126 (1960); Navasky, The Benevolent Housing Quota, 6 How. L.J. 30 (1960); Comment, 59 Mich. L. Rev. 1054, 1069 (1961).

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VII

POSTSCRIPT

More recently, the Supreme Court handed down the decision in *Watson v. City of Memphis*,[91] dealing with the right of Negroes to use municipal parks and other city-owned or operated recreational facilities on a nonsegregated basis. Although the right to equal educational facilities was not in issue, the Court's discussion of the nature of plaintiff's constitutional rights under the fourteenth amendment has a direct bearing on the problems dealt with in this article. After all, the constitutional principles governing the right to the unsegregated use of publicly controlled facilities do not vary depending on whether the facilities involved are of an educational or a recreational nature.

The case of *Watson v. City of Memphis* arose on a complaint by Negro citizens residing in Memphis against that city. They charged that the city violated their constitutional rights under the equal protection clause by maintaining some public recreational facilities exclusively for the whites and others exclusively for the Negroes. The city opposed the granting of the injunction sought by plaintiffs; it conceded its duty to desegregate the facilities but proposed to do so by a gradual plan. Denying the petition, a federal district court held that because of the local conditions in Memphis additional time was needed to accomplish full desegregation, and that the gradual plan was in the public interest and was consistent with good faith implementation of the governing constitutional principles as announced in the second *Brown* decision. The United States Court of Appeals, Sixth Circuit, affirmed.[92]

The Supreme Court reversed. It reaffirmed its previous rulings which had extended the anti-segregation doctrine of the first *Brown* decision to recreational facilities operated or controlled by public authorities.[93] It further held that petitioners' right to the unsegregated use of public facilities, based on the equal protection clause, was a present right requiring immediate instead of gradual implementation. Finally, the Court held that the equitable considerations which justified gradual desegregation of educational facilities under the second *Brown* decision were not applicable in a case involving discrimination in public recreational facilities.

The unanimous opinion of the Supreme Court stressed emphat-

91. Supra note 44.

92. 303 F.2d 863 (6th Cir. 1962).

93. See cases cited in note 54 supra.

ically that the right to equal protection under the fourteenth amendment is a present right. It spoke of the "usual principle that any deprivation of constitutional rights calls for prompt rectification."[94] It stated that the rights asserted in this case "are, like all such rights, *present* rights," and that the basic guarantees of the Constitution "are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled."[95] At another place the opinion referred to the "here clearly controlling principle that constitutional rights are to be promptly vindicated," and that "affirmative judicial action was required to vindicate plain and present constitutional rights."[96]

It seems that the Supreme Court by thus stressing the "present" nature of the constitutional right wanted to counter the impression that the Court in the *Brown* decisions had weakened that doctrine established in earlier decisions. This emphasis may also be a reflection of the Court's disapproval of those school desegregation programs developed in the wake of the second *Brown* decision which tended to use the "deliberate speed" concept as an excuse for following a policy of "indefinite delay in elimination of racial barriers in schools."[97]

At one place, the opinion refers to the practice of discrimination as "violative of now long-declared and well established individual rights."[98] The term "individual right" seems to correspond to the concept of the "personal right" laid down in *Sweatt* and *McLaurin*.

In discussing the courts' equitable power to grant an extension of time for the removal of all racial barriers in places controlled by public authority, the Supreme Court's opinion in *Watson* takes pains to stress the limitation of this power and the exceptional character of the delay in the enjoyment of constitutional rights resulting from its exercise. It calls such delay as countenanced by the second *Brown* decision "a necessary, albeit significant, adaptation" and a "narrowly drawn, and carefully limited, qualification" of the principle of prompt fulfillment of constitutional guarantees and one which "is not to be unnecessarily expanded in application."[99] Most significant in this respect is the following passage:

94. Watson v. City of Memphis, 373 U.S. at 532-33.

95. Ibid. In 373 U.S. at 533, n. 5, the Court cited McLaurin, supra note 21, Sipuel, supra note 13, and Florida ex rel. Hawkins, supra note 76. Actually, none of the first three decisions which established the personal and present nature of the rights under the equal protection clause indicated that implementation of such rights could be postponed for "an overwhelming compelling reason."

96. Id. at 539.

97. Id. at 530.

98. Id. at 533.

99. Ibid.

> The claims of the city to further delay in affording the petitioners that to which they are clearly and unquestionably entitled cannot be upheld except upon the most convincing and impressive demonstration by the city that such delay is manifestly compelled by constitutionally cognizable circumstances warranting the exercise of an appropriate equitable discretion by a court. In short, the city must sustain an extremely heavy burden of proof.[100]

This language lays down strict conditions for the exercise of the courts' equitable power to postpone desegregation. It thus circumscribes and limits the doctrine of the second *Brown* decision. That decision referred to equity as characterized by a facility "for adjusting and reconciling public and private needs,"[101] without restricting the court's discretion in arriving at a decision it thinks warranted by the circumstances. While the second *Brown* decision placed on the school districts the burden of establishing the need for additional time for desegregation, it did not indicate then, as it does in *Watson* now, that this is "an extremely heavy burden of proof." The emphasis now placed on the limitation of the courts' power to delay the fulfillment of constitutional rights appears to be an important development of the law governing desegregation of public educational facilities.

This article deals, among other things, with the problem arising from the clash of the constitutional doctrine of "personal and present" rights with the equitable power of the courts to postpone fulfillment of these rights. The Supreme Court shows in *Watson* that it is concerned over this problem resulting from the rule laid down in the second *Brown* decision. *Watson* stresses the "present" nature of the constitutional right to equal treatment and limits the courts' power of postponement derived from equity rules. Thus, it may be expected that as a result of *Watson* the instances of delayed or denied fulfillment of the right of individual Negro children to desegregated education will be fewer and less glaring. But so long as the courts retain the power, given to them in the second *Brown* decision and reaffirmed in *Watson*, to postpone desegregation of public educational facilities, many will continue to be haunted by the spectre of the Negro child whose personal and present constitutional right to desegregated education has been recognized, but who, nonetheless, remains in segregated classes to the end of his school days because the court-approved plan of gradual desegregation will not reach him before he graduates.

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100. Ibid.
101. 349 U.S. at 300.